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Supreme Court, U.S.
FILED

97 1089 DEC 30 1997

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1997

DAWN F. MUNDAY - PETITIONER,

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED, ET AL., - RESPONDENTS

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

Waste Management of North America, Incorporated, et al., filed its notice of appeal from the United States District Court for the District of Maryland after the court entered its decision, and Dawn Munday filed her counter-appeal thereafter. The Fourth Circuit Court of Appeals overturned the District Court's decision in part, remanded the case to the District Court in part and ruled that the Counter appeal was moot. The questions presented here are:

I. Didn't the Fourth Circuit Panel of Judges below err by interpreting 42 U.S.C. 2000 e3(a) to permit forms of retaliation, including a management-led campaign to drive an individual from the work place, that did not meet the panel's

definition of "adverse employment actions"?

II. Didn't the Fourth Circuit Panel of Judges below err by substituting its Judgment for that of the Trial Court about the existence of constructive discharge and more specifically the intolerability of the working conditions, particularly where the Appellate Court did not have the transcript of testimony from the Trial Court?

III. Didn't the Fourth Circuit Panel of Judges below err by failing to decide the issue of whether or not compensatory and punitive damages should be apportioned for acts prior to and after November 21, 1991 (the date on which Title VII was changed to allow compensatory and punitive damages) and by

remanding this case to the District Court for a further trial on the breach of contract damages, in light of the facts that the original decision of the Trial Court made a clear finding as to the breach of contract damages and the apportionment issue?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

1) Petitioner - Dawn Munday

2) Respondents- Waste Management of North America, Inc.

Waste Management of Maryland, Inc.

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OPINIONS BELOW

The opinion of the District Court of the United States for the District of Maryland, dated August 4, 1994, is attached hereto the Appendix B. It is published at 858 F.Supp.1364 (D.Md.1944). The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 11, 1997, is published at 126 F.3d 239 (4th Cir. 1977) and reprinted here as Appendix A. By order filed on October 7, 1997, the Fourth Circuit denied your Petitioner's Motion For Rehearing And Suggestion For Rehearing En Banc. A copy of that decision is Appendix C.

JURISDICTION

This case involves claims for money

damages due to violation of Title VII (and state and local laws) and breach of contract. It was tried before the U.S. District Court for the District of Maryland. An appeal and counter-appeal were timely filed.

The Fourth Circuit overruled the District Court decision in part, affirmed it in part, remanded it to the District Court and held that the apportionment issue was moot. On October 7, 1997 the Fourth Circuit denied Munday's timely-filed Motion For Rehearing And Suggestion For Rehearing En Banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

This Honorable Court has jurisdiction over this case pursuant to

28 U.S.C. 1254 and the Trial Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. 2000e(2) and (3).

STATUTES AND RULES INVOLVED IN THIS CASE

42 U.S.C. 2000e2(a)
42 U.S.C. 2000e3(a)
42 U.S.C. 2000e7
F.R. App. P.10(b)(2)

These statutes and rules are set forth in Appendix D.

STATEMENT OF THE CASE

The District Court found intentional retaliation and constructive discharge in violation of statute (specifying Title VII as opposed to State or local law) and in breach of a settlement agreement between the parties and found that the Plaintiff suffered damages of $167,183.47. These damages were apportioned to $77,183.47 because the

Trial Court ruled that punitive and compensatory damages could not be awarded for acts which occurred prior to November 21, 1991. Waste Management appealed the trial court's decision and Munday filed a counter-appeal on the apportionment issue.

The Fourth Circuit reversed the finding of a Title VII violation and constructive discharge finding, affirmed the finding of retaliation in breach of the settlement contract, found the apportionment issue moot and remanded the case for further proceedings on the issue of damages under the breach of contract count.

REASONS FOR GRANTING THE WRIT

I. THE PANEL'S HOLDING THAT TITLE

VII PERMITS EMPLOYER RETALIATION UNLESS IT MEETS THE PANEL'S DEFINITION OF AN ADVERSE EMPLOYMENT ACTION HAS NO BASIS IN THE LANGUAGE OF 42 U.S.C. 2000e3(a), UNDERMINES ENFORCEMENT OF TITLE VII, AND CONFLICTS WITH CASE LAW IN THIS AND OTHER CIRCUITS.

42 U.S.C. 2000e3(a) (known as § 704(a) of Title VII) broadly prohibits employers from discriminating against an employee for engaging in protected activity (ie retaliation). The provision is not limited to retaliation or discrimination that takes the form of an "adverse employment action" or to actions that affect the terms and conditions of a person's employment. Rather, the plain terms of this provision prohibit employers from taking any kind of action against an employee who participates in

proceedings under Title VII.

However, according to the majority of the Panel below, § 704(a) does not prohibit an employer from subjecting an employee to a retaliatory campaign of shunning and spying designed to cause the employee to resign -- even where, as here, the campaign concededly caused the employee compensable emotional distress and succeeded in pressuring her to resign. The majority's holding that § 704(a) permits some forms of retaliation cannot be reconciled with the language of the provision, which prohibits all retaliation, without exceptions. It is antithetical to the purpose of the anti-retaliation provision and inconsistent with decisions by this Court and other Courts of Appeals. See, e.g., McKenzie

v. Illinois Dept't of Transportation, 92 F.3d 473, 485 (7th Cir. 1996) noting that "under the proper circumstances, an employer who orders other employees not to talk to a Title VII claimant could indeed retaliate against that claimant by, in effect, ordering others to shun her".

The starting point for interpreting a statute is the language of the statute itself. Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990). Section 704(a) makes it unlawful for "an employer to discriminate against any of his employees or applicants for employment...because he has made a charge" under Title VII. This language broadly prohibits any discrimination against an employee for filing a charge.

It "speaks unconditionally, without limitation to acts causing particular harms such as the loss of a particular job or promotion." Smith v. Secretary of the Navy, 659 F.2d 1113, 1119 n. 56 (D.C. Cir. 1981); McDonnell v. Cisneros, 84 F.3d 256, 258 (7th Cir. 1996) (Posner, C.J.) ("No limiting language appears in Title VII's retaliation provision."); c.f. Passer v. American Chem. Soc'y, 935 F.2d 322, 331 (D.C.Cir. 1991) (holding that the same language in § 4(d) of the ADEA "does not limit its breach only to acts of retaliation that take the form of cognizable employment actions, such as discharge, transfer, or demotion.".

It is striking that the panel majority limited the prohibition on retaliation in § 704(a) by using terms

that Congress used in 42 U.S.C. 2000e2(a) (Section 703) but chose not to use in § 704(a). In prohibiting discrimination on the basis of race, color, religion, sex or national origin in §703 (a), Congress prohibited employers from "discriminat[ing] against any individual with respect to his compensation, terms conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a) (emphasis added).

In contrast, the language of § 704(a), as noted above, contains no such limitation. By writing § 703 (a) as it did, Congress demonstrated that it knew how to draft a prohibition on discrimination that is limited to specific employment practices. If it had wanted the prohibition on discrimination (retaliation) for filing a charge in §

704(a) to be similarly limited, it would have been a simple matter for congress to use the same language it used in § 703(a) to accomplish that end. Instead, Congress chose to use broader language. The logical inference is that Congress in § 704(a) intended to prohibit not merely discrimination with respect to terms and conditions of employment, but discrimination of any kind.

If the decision of the Fourth Circuit in this case is allowed to stand, employees within the jurisdiction of the Fourth Circuit (and perhaps beyond) will lose an important part of their protection against retaliation. The EEOC's ability to enforce Title VII will also be compromised, since some employees who would otherwise file charges of

discrimination will undoubtedly keep silent once they become aware that they have no statutory protection against the sort of retaliation endured by the plaintiff in this case.

Your Petitioner therefore urges this Honorable Court to grant the Petition for Writ of Certiorari and make clear that § 704(a) prohibits any kind of retaliatory conduct that would deter a reasonable person from enforcing their rights under Title VII. This would also resolve the differences in regard to the interpretation of §704(a) amongst the various circuits and protect the rights of all employees.

II. THE PANELS HOLDING ABOUT INTOLERABILITY OF CONDITIONS CAN ONLY BE FAIRLY MADE ON A REVIEW OF THE ENTIRE RECORD AND F.R. APP. P. 10 (b)(2) REQUIRES

THE APPELLANT TO PROVIDE ALL OF THE RELEVANT RECORD TO SUPPORT ITS APPEAL. THE FAILURE TO PROVIDE THE RECORD SHOULD BAR SUCH AN APPEAL AND THERE SHOULD BE CASE LAW THAT MAKES THIS CLEAR.

Even if adverse employment action is required under § 704(a) there was constructive discharge found by the Trial Court and constructive discharge is an adverse employment action itself. See Evans v. Davie Truckers, Inc., 769 F.2d 1012, 1014 (4th Cir. 1985). Contrary to the decision of the Fourth Circuit, the only two elements of constructive discharge are: 1) deliberateness of the employers action (which was found below and not questioned by the Fourth Circuit Panel) and 2) that the working conditions become so intolerable that a reasonable

person would quit. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

The Lower Court correctly cited the law as to constructive discharge at page 23 of its decision and made a factual determination, that the conduct over a number of years caused the Petitioner psychological and physical harm and created an intolerable working condition. The Fourth Circuit inappropriately overruled these factual findings, implying that there had to be a separate adverse employment action to support a constructive discharge finding. If that decision is allowed to stand, it will deny employees within the Fourth Circuit (and perhaps beyond) their full rights.

Further, the Fourth Circuit has

previously stated that constructive discharge is a question of fact which is reviewed under the clearly erroneous standard. Bristow, 770 F.2d at 1255. And see Evans v. Davie Truckers, Inc., 769 F.2d 1012, 1014 (4th Cir. 1985) which applied the clearly erroneous standard to review of a decision on constructive discharge. Intolerability is an element of constructive discharge. In this case the Fourth Circuit incorrectly stated that the clearly erroneous test did not apply. This confusion needs to be clarified by this Honorable Court. Also, this Honorable Court has indicated that the clearly erroneous standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it

would have decided the case differently. Anderson v. City of Bessemer City, N.D., 470 U.S. 564, 573 (1985). The Fourth Circuit incorrectly did just this.

It is unreasonable for the Fourth Circuit to determine that the evidence did not support a finding of intolerability unless the appellate court had looked at the entire record. Since the Fourth Circuit Panel did not have the entire record, it should not have substituted its judgment for that of the trier of fact.

When an Appellant intends to challenge a factual finding or conclusion, F.R. App. P. 10 (b) (2) requires the Appellant to include in the record a transcript of all evidence relevant to such finding or conclusions.

This obligation also arises when the Appellate Court is asked to review issues of fact mixed with issues of law. Southwest Administrators, Inc. v. Lopez 781 F. 2d 1378, 1380 (9th Cir.1986). Failure to file a required transcript raises an effective barrier to informed, substantive appellate review. McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992). In such circumstances, the appellate court has no alternative but to affirm the affected ruling, Deines v. Vermeer Mfg. Co., 969 F.2d 977 979 (10th Cir. 1992) (citing numerous cases), refuse to consider the appeal, Powell v. Estelle, 959 F.2d 22, 26 (5th Cir. 1992) or dismiss the appeal outright. Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991). Therefore, the failure

to provide the transcript in this case should have been a bar to the appellate review the Appellant requested. This is particularly true in the present case, since the Trial Court's decision in regard to constructive discharge, at page 23 states that the Trial Court relied on "all" of the evidence (rather than just those facts set forth in its decision).

It is also important to note that the dissent found that even on the limited record before this Honorable Court, there was sufficient evidence of intolerability. If there is room for disagreement between the Appellate Judges, based only on the facts set forth in the Trial Court's decision, clearly the Trial Court's decision should not be set aside without a review of all of the

evidence. This is an important principle in regard to Appellate review which should be clearly stated for all Appellate Courts and for all future Appellants and Appellee.

III. THE APPORTIONMENT ISSUE SHOULD HAVE BEEN HEARD BELOW BECAUSE IT WAS RELEVANT TO THE DAMAGE FINDINGS BY THE TRIAL COURT IN REGARD TO BOTH THE TITLE VII AND BREACH OF CONTRACT COUNTS AND IS AN ISSUE THAT HAS NOT YET BEEN DECIDED BY AN APPELLATE COURT IN REGARD TO THE STATUTE AT ISSUE IN THIS CASE. FURTHER, A PLAINTIFF THAT SUCCESSFULLY LITIGATES AN ISSUE TO A JUDGMENT FOR A SUM OF MONEY SHOULD NOT BE PUT TO THE EXPENSE OF ANOTHER TRIAL ON DAMAGES WHEN THE ORIGINAL DECISION CLEARLY SETS FORTH THE FINDINGS AS TO DAMAGES.

The Trial Court held that only 40% of punitive and psychological damages were due to the Plaintiff (for those actions which occurred after November 21,

1991 - $20,000.00 of psychological at A31 and $40,000.00 of punitives at A32). This was based on a change in Title VII which was effective on November 21, 1991. The Trial Court held that the damages under the breach of contract count should be limited to the apportioned amounts under Title VII (plus the back pay). The Trial Court also held that under Maryland law on breach of contract, the damages would not have to be apportioned (A34).

A district court is required to follow the choice of law rules of the forum where it sits. Friendship Heights Associates v. Koubek, 573 F.Supp. 100, 102 (D.Md. 1983). The court in Friendship Heights also recognized that Maryland applies the law of the place where the contract was made. The

Settlement Agreement was entered into in Maryland and thus should be governed by Maryland law.

The Fourth Circuit recognized in Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299, 1303 (4th Cir. 1978) that a settlement agreement terminating civil rights litigation was a private contract, the validity and the interpretation of which was governed by state law. The only restrictions upon a court's authority to require the parties to fulfill a settlement agreement are those contained in the contract itself and the principles of contract law, provided enforcement of the agreement does not conflict with the purposes of Title VII. EEOC v. Safeway Stores, 714 F.2d 567 (5th Cir. 1983). The use of

federal common law (as applied in the Trial Court's decision) should be limited to situations where a significant conflict exists between some federal policy or interest and the use of state law. O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). There is no conflict in allowing greater damages under Maryland breach of contract law (than would be allowed under Title VII) because Title VII, 42 U.S.C. §2000e-7 very specifically states:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any state or political subdivision of a state...

Section 2000e-7 explicitly provides for state law that allows an employer to

be liable for damages other than (and, therefore, greater than) those allowed under Title VII.

In Bernstein v. Aetna Life & Casualty, 843 F.2d 359 (9th Cir. 1988) the court recognized the state interest in having its laws upheld and saw no significant conflict with Title VII merely because the state common law allowed greater remedies than those available under Title VII. The conflict between Bernstein and other decisions and the Fourth Circuit decision in this case needs to be resolved.

Further, Title VII is a remedial statute, the purpose of which is to protect employees; accordingly, the statute should be construed liberally to that effect. Tcherepnin v. Knight, 389

U.S. 332, 336, (1967). Reading §2000e-7 in a liberal manner indicates that State law can provide additional protection to employees without hampering the purpose of Title VII.

Even if this Honorable Court should find that damages from a breach of a Title VII settlement agreement are controlled by Title VII, Title VII does not require apportionment of the damages. Landgraf v. USI Film Products, 511 U.S. 244 (1994) held that Title VII should not be applied retroactively, but also discussed when application of a new statute to past conduct is not retroactive. Plaintiff respectfully contends that pursuant to Landgraf, the application of the November 21, 1991 amendment of Title VII to the entire

course of Waste Management's conduct is not retroactive. The Supreme Court specifically stated in Landgraf that a statute does not necessarily operate retroactively merely because it is applied to conduct antedating the statute's enactment. Landgraf, 114 S.Ct. at 1499. A court must ask whether the new provision of the statute "attaches new legal consequences to events completed before its enactment." Id. (emphasis supplied). The word "completed" signifies that applying the Amendment to an entire course of conduct is not a retroactive application of the statute, provided the conduct is continuous and ongoing (i.e., from before the date of enactment until after the date of enactment).

In Reynolds v. United States, 292 U.S. 443 (1934), this Honorable Court considered a change in the law prohibiting a government hospital from offsetting the costs of the plaintiff's room and board from his accrued veteran's benefits. This change in the law occurred in the middle of a hospital stay that began before the enactment of the statutory provision and was completed after the enactment. The Supreme Court held that it was not a retroactive application of the new statute to apply it to the entire hospital stay. Reynolds, 292 U.S. at 448-449.

The general presumption against applying statutes retroactively is based on fair notice concerns for the party now affected by the new statute. For a

wrongdoer to claim unfairness in the application of ostensibly new sanctions to an entire course of illegal conduct when the course of conduct is continued after the new sanctions become law, however, stretches the concept of fairness past the breaking point, as the wrongdoer easily could have chosen to discontinue the course of conduct once the new sanctions became effective. In essence, there was a single ongoing wrong (ie the retaliatory course of conduct) committed against Plaintiff, which began before the effective date of the Amendment, but which continued and was not <u>completed</u> until after the Amendment became law. It is not retroactive to apply the amendment of the law to the entire period of wrongdoing and therefore

the damage finding need not be apportioned, even under a Title VII analysis.

Further, the calculation of damages is a finding of fact. U.S. v. St. Paul Fire and Marine Insurance Company, 86 F.3d 332 (4th Cir. 1996). The extent of damages is also a finding of fact. Kahle v. McDonough Builders, Inc., 582 A.2d 557 (Md. 1990). Since the Appellate Court has ruled that the facts, as already determined by the Trial Court, are undisputed, the factual findings as to the existence and amounts of damage are fixed by the Trial Court's decision in this case.

A decision on the apportionment issue (which is an unanswered question to date) could be applied to the Trial

Court's decision so that a remand and possible further appeals will not be necessary. A remand, with its accompanying expenditure of additional judicial resources, in a case thought to be completed, should be limited to cases where further action must be taken by the District Court. See Consolidated Aluminum Corporation v. Foseco International Limited, 910 F. 2d 804 at 814 (Fed. Cir. 1990).

This Honorable Court should address the as yet undecided and significant apportionment issue, avoid unnecessary further proceedings in this case and other Title VII cases and possible further appeals from those unnecessary proceedings. This Honorable Court should also make clear that remanding for

further proceedings should only be done when absolutely necessary.

CONCLUSION

For all or any of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: 12/22/97

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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105 pp

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

DAWN F. MUNDAY,
Plaintiff-Appellee,

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED; WASTE MANAGEMENT OF MARYLAND, INCORPORATED,
Defendants-Appellants.

No. 94-2192

DAWN F. MUNDAY,
Plaintiff-Appellant,

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED; WASTE MANAGEMENT OF MARYLAND, INCORPORATED,
Defendants-Appellees.

No. 94-2193

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-92-467-K)

Argued: May 3, 1995

Decided: September 11, 1997

Before WIDENER and WILLIAMS, Circuit Judges, and HEANEY,
Senior Circuit Judge of the United States Court of Appeals
for the Eighth Circuit, sitting by designation.

No. 94-2192 affirmed in part, reversed in part, and remanded, and No. 94-2193 dismissed as moot by published opinion. Judge Widener wrote the opinion, in which Judge Williams concurred. Senior Judge Heaney wrote a concurring and dissenting opinion.

COUNSEL

ARGUED: Russell Heuer Gardner, PIPER & MARBURY, Baltimore, Maryland, for Appellants. Harold R. Weisbaum, BLUM & WEISBAUM, P.A., Baltimore, Maryland, for Appellee. **ON BRIEF:** Ann L. Lamdin, PIPER & MARBURY, Baltimore, Maryland, for Appellants. Charles J. Goetz, III, BLUM & WEISBAUM, P.A., Baltimore, Maryland, for Appellee.

OPINION

WIDENER, Circuit Judge:

Defendants Waste Management of North America, Inc. and Waste Management of Maryland, Inc. (collectively, Waste Management) appeal from an adverse judgment of the district court, sitting without a jury, on claims of retaliation under Title VII, 42 U.S.C. § 2000e-3(a), and breach of contract brought by plaintiff Dawn Munday. Miss Munday cross-appeals from the district court's conclusions that she could not recover compensatory or punitive damages for defendants' conduct occurring prior to the effective date of the Civil Rights Act of 1991 and that the Title VII remedies awarded in this case preclude additional recovery for breach of contract under Maryland law. For the following reasons, we affirm in part, reverse in part, and remand.

The facts of this case are set forth in the opinion of the district court, *Munday v. Waste Management of North America, Inc.*, 858 F. Supp. 1364 (D. Md. 1994), and because the parties chose not to transcribe the proceedings below, those facts are undisputed.[1] Briefly,

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[1]Because both parties have chosen not to provide a transcription of the record below or to identify factual errors made by the district court, we

those facts are as follows. Miss Munday began working for Waste Management of Maryland in December 1986. *Munday*, 858 F. Supp. at 1367. After a transfer to Waste Management of Greater Washington, Miss Munday resigned and was rehired as a truck driver by Waste Management of Maryland in August 1988. *Munday*, 858 F. Supp. at 1367. She was subjected to a number of instances of sexual harassment. *Munday*, 858 F. Supp. at 1367-68. On May 30, 1989, after Miss Munday walked off the job because of her dissatisfaction with the truck with which she was provided for the day, she was properly fired for insubordination. *Munday*, 858 F. Supp. at 1368.

Miss Munday then filed a claim of sexual harassment and sex discrimination with the Howard County, Maryland Office of Human Rights, which issued a reasonable-cause letter. *Munday*, 858 F. Supp. at 1369. A hearing was commenced, but on April 19, 1991, the parties settled the dispute. *Munday*, 858 F. Supp. at 1369, 1375. In the settlement agreement, Waste Management agreed, among other things, to expunge Miss Munday's termination, to reinstate Miss Munday, and not to retaliate against her for filing the complaint in the Office of Human Rights. *Munday*, 858 F. Supp. at 1369.

Prior to Miss Munday's agreed return to work, Waste Management of Maryland held a safety meeting at which the employees were told not to sexually harass Miss Munday. *Munday*, 858 F. Supp. at 1369. Robert Bohager, General Manager of the Maryland facility, *Munday*, 858 F. Supp. at 1367, also told the employees not to socialize with Munday and to avoid her as much as possible. *Munday*, 858 F. Supp. at 1369.

When Miss Munday returned to work, on July 8, 1991, *Munday*, 858 F. Supp. at 1369, Waste Management had failed to take several measures necessary to prepare for her return, although these measures were taken thereafter. *Munday*, 858 F. Supp. at 1369. Other employ-

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will take all, and only, the facts as stated by the district court as true and undisputed. See *Hicks v. United States*, 368 F.2d 626, 630-31 (4th Cir. 1966) ("The determination . . . involves not only the formulation of the legal standard, but . . . its application to the evidentiary facts as established; and since these are uncontested, there is no basis for applying the 'clearly erroneous' rule" of F.R. Civ. P. 52(a)).

ees refused to talk with her, and she was told that Bohager and another manager, Heider, had instructed the employees to ignore her and to report back to Bohager anything she said to other employees. *Munday*, 858 F. Supp. at 1370.

On July 26, 1991, Heider informed Miss Munday that Bohager had told the employees not to talk to Miss Munday and that Bohager wanted to get rid of Munday. *Munday*, 858 F. Supp. at 1370. Later that day, at a scheduled meeting attended by Munday, Bohager, and Chad Johnson, Waste Management of Maryland's Operations Manager, to address Miss Munday's complaints, Bohager yelled at Munday because he had heard a rumor that she planned to sue the company again. *Munday*, 858 F. Supp. at 1370. Munday denied this and attempted to address her concerns, but Bohager stated, colorfully, that he did not care about her problems. *Munday*, 858 F. Supp. at 1370.

From August 1991 to September 1992, Miss Munday worked intermittently for Waste Management due to several periods of disability leave. See *Munday*, 858 F. Supp. at 1370-71. During this time, while she was working, Miss Munday continued to be ignored by her coworkers, was assigned a route other than one she requested, and was subjected to a number of work-related unpleasantries of which she complained and which were adequately investigated and addressed by Waste Management. See *Munday*, 858 F. Supp. at 1370-71.

On September 29, 1992, Miss Munday was placed on disability leave following "so-called panic attacks while driving her route." *Munday*, 858 F. Supp. at 1371. She began a new job in October 1992 although she did not resign from Waste Management until December 7, 1992. *Munday*, 858 F. Supp. at 1371.

The district court, sitting without a jury, found that Miss Munday had not made out a prima facie case of sexual harassment or sex discrimination. *Munday*, 858 F. Supp. at 1374.[2] The district court found for Miss Munday, however, on her claim that Waste Management,

[2]Plaintiff does not appeal these conclusions.

through Bohager, retaliated against her for filing her claim with the Office of Human Rights, in violation of Title VII, and breached a provision of the settlement agreement which provided that Waste Management, "'agrees that there shall be no discrimination or retaliation of any kind against any person because of lawful opposition to any practice declared unlawful under . . . Title VII, or because of the filing of a charge, giving of testimony or assistance, or participation in any manner in any investigation, proceeding or hearing under . . . Title VII.'" *Munday*, 858 F. Supp. at 1376 (quoting the settlement agreement) (alterations in original).

The district court granted Miss Munday backpay, *Munday*, 858 F. Supp. at 1378, as well as compensatory and punitive damages for the conduct of Waste Management occurring after November 21, 1991, the effective date of the Civil Rights Act of 1991, which provides for such remedies. *Munday*, 858 F. Supp. at 1378-79; see 42 U.S.C. § 1981a(b)(1), (3). The district court found that Maryland law would permit an award of compensatory and punitive damages for the tortious breach of a contract, *Munday*, 858 F. Supp. at 1379-80, but held that federal law governs the enforcement of a Title VII settlement agreement and that Miss Munday could not recover through a state law breach-of-contract claim compensatory and punitive damages for pre-November 21, 1991 conduct where those damages "are unavailable under the very federal law which itself provides *the* right which plaintiff is enforcing." *Munday*, 858 F. Supp. at 1381. Accordingly, the district court held that "plaintiff is limited to Title VII remedies." *Munday*, 858 F. Supp. at 1381.

Defendants, while disputing none of the factual findings of the district court, challenge each adverse conclusion of the district court as erroneous as a matter of law. We will address each such challenge.

I.

In order to establish a prima facie claim of retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a),[3] a plaintiff must show that

[3]"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

"1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985).[4] The employer may then rebut the prima facie case, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), by showing that there was a legitimate non-discriminatory reason for the adverse action, *Ross*, 759 F.2d at 365, after which the burden shifts back to the plaintiff to show that those reasons are pretextual. *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994).

A.

The district court found that Miss Munday had established a prima facie case of retaliation and that defendants had not presented any legitimate nondiscriminatory alternative. See *Munday*, 858 F. Supp. at 1374-75. The district court found that Bohager's conduct in "yelling at [Miss Munday] during the July 26, 1991, meeting, directing other employees to ignore her and to spy on her, and generally refusing to communicate with her concerning her employment-related complaints, even though some of them were not meritorious," constituted "a pattern of retaliation. . . . In effect, Bohager had knowledge of a number of Munday's employment related and non-employment related problems and failed to act appropriately in a number of instances in the expectation that those problems would eventually wear down Munday and force her to quit." *Munday*, 858 F. Supp. at 1374.

We agree with the defendants that, as a matter of law, this scenario does not rise to the level of an adverse employment action for Title VII purposes. In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected. See *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (Hopkins was not discharged from employment, and the comments in

[4]There is no dispute that Miss Munday's complaint before the Office of Human Rights constituted a protected activity.

question were not and did not result in any adverse employment action); *DiMeglio v. Haines*, 45 F.3d 790, 804 & n.6 (4th Cir. 1995) (a reprimand and reassignment may constitute an adverse employment action); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985) (the Age Discrimination in Employment Act "affords no protection unless there has been some adverse employment action by the employer. Because Bristow was not actually discharged, he relies here on a theory of constructive discharge."), *cert. denied*, 475 U.S. 1082 (1986); *Evans v. Davies Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985) (Title VII retaliation claim requires adverse employment action, which does not obtain where plaintiff voluntarily resigns). We note that, although the district court found that Bohager knew of and did not address Miss Munday's employment-related complaints, the district court also found that Miss Munday's employment-related complaints were addressed, investigated and, where appropriate, corrected, by other employees of Waste Management. See *Munday*, 858 F. Supp. at 1369, 1370, 1371, 1372.

We thus hold that, because there was no adverse employment action, the district court erred in concluding that Miss Munday suffered unlawful retaliation under § 2000e-3(a) of Title VII by virtue of Bohager's conduct in, for example, yelling at Miss Munday and telling others to ignore and to spy on her.

B.

The district court, after concluding that Bohager had unlawfully retaliated against Miss Munday for the reasons we have rejected above, continued by concluding that Waste Management had constructively discharged Miss Munday. See *Munday*, 858 F. Supp. at 1375-76. Constructive discharge may be an adverse employment action in violation of § 20003e-3(a) "when the record discloses that it was in retaliation for the employee's exercise of rights protected by the Act." *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). The district court did not explicitly find any causal link between the protected activity of Miss Munday and the constructive discharge, as required by *Ross*; however, we are of opinion that because the district court relied upon substantially the identical factual bases in determining that Miss Munday had been constructively discharged as it had relied upon in determining that

Miss Munday had been unlawfully retaliated against, the gist of the district court's conclusion regarding the Title VII retaliation claim is that Miss Munday was subjected to retaliatory constructive discharge because of her pursuit of a complaint before the Office of Human Rights, in violation of § 2000e-3(a) of Title VII. We now take up the defendants' challenge to the district court's finding that Miss Munday was constructively discharged.

Constructive discharge occurs "when 'an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.'" *Holsey*, 743 F.2d at 209 (quoting *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972)). Thus, "[a] plaintiff alleging constructive discharge must . . . prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." *Bristow*, 770 F.2d at 1255. The district court found that Bohager deliberately attempted to force Miss Munday to quit her job, *Munday*, 858 F. Supp. at 1375. Defendants argue, however, that the facts as stated by the district court do not, as a matter of law, support its conclusion that Miss Munday's working conditions were intolerable.

"Intolerability of working conditions . . . is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign. . . . An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress." *Bristow*, 770 F.2d at 1255. We agree with the defendants that the facts as found by the district court do not rise to the level of objective intolerability sufficient to create an adverse employment action under § 2000e-3(a).

The district court found that "[t]hroughout her tenure at Waste Management, [Miss Munday] had to cope with being ignored both by her co-workers and by the top supervisor at the . . . facility." *Munday*, 858 F. Supp. at 1376. As stated above, this conduct is insufficient to establish an adverse employment action in itself. Miss Munday's complaints were investigated, and were corrected where meritorious. See *Munday*, 858 F. Supp. at 1369, 1370, 1371, 1372. She never complained about being ignored, and there is no evidence that any co-

worker actually spied on her or reported her statements to Bohager or other management. Moreover, Miss Munday's employment status was not altered, and there is no evidence that she ever received a reprimand in her record or an unsatisfactory evaluation. Finally, Miss Munday did not actually resign her employment with Waste Management until December 1992, some seventeen months after the events leading to and including July 26, 1991, upon which most of her claim was based, thus objectively belying her assertion that she was forced to resign from her employment with Waste Management.

In short, there is simply no evidence that Miss Munday was forced to resign from Waste Management by any conduct of Bohager or others. See *Holsey*, 743 F.2d at 209. We thus hold that she was not constructively discharged, notwithstanding either Bohager's intent to persuade her to resign or the fact that he successfully made her working environment unpleasant. Indeed, the district court found as a fact that Miss Munday "wrongly viewed such antagonism and retaliatory conduct as based on sex discrimination and sexual harassment."

Because we hold that Waste Management took no adverse employment action against Miss Munday in retaliation for her engagement in protected activity, we reverse the judgment of the district court on Miss Munday's claim of unlawful retaliation in violation of § 2000e-3(a) of Title VII.

II.

The district court found that Waste Management breached the April 1991 settlement agreement by retaliating against Miss Munday for engaging in protected activity, in violation of paragraph 4 of the settlement agreement.[6] The district court relied on the reasons stated in its analysis of the Title VII retaliation claim to support this conclu-

[6]The district court held that a second alleged breach of the settlement agreement, the failure to expunge Miss Munday's termination of May 30, 1989 prior to her return to work, would result in nominal damages at most, and that a third, the failure to provide Miss Munday with adequate restroom facilities, did not occur because the bathroom facilities were made adequate within a reasonable time after her return to work. See *Munday*, 858 F. Supp. at 1376.

sion. Defendants argue that this conclusion, as well, was erroneous as a matter of law.

Paragraph 4 of the settlement agreement provides that "there shall be no discrimination or retaliation of any kind" against any person for engaging in protected activity. The language "of any kind" clearly requires a lower threshold of proof than the adverse employment action required to show a violation of § 2000e-3(a), see *Ross*, 759 F.2d at 365; thus, we think the district court was correct in concluding that Bohager and Waste Management violated the settlement agreement by intentionally making Miss Munday's working conditions unpleasant because of her claim before the Office of Human Rights.[8]

Because we have reversed the district court's judgment on Miss Munday's Title VII claim, and because the district court held that "the damages which plaintiff suffered as a result of defendant's Title VII violation *and* breach of contract are identical. Therefore, plaintiff is limited to Title VII remedies," *Munday*, 858 F. Supp. at 1381, we must remand this case to the district court for a determination of the extent of Miss Munday's damages resulting from defendants' breach of the settlement agreement. For the same reason, we are of opinion that Miss Munday's cross-appeals are moot, and we will not address those issues.

III.

For the foregoing reasons, the judgment of the district court is

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[8]Defendants present us with no argument to support their contention that paragraph 4 is not an enforceable contract provision, and we find none. As we have stated, the promise made by defendants in their settlement agreement is not identical to the prohibition in § 2000e-3(a) against taking adverse employment action in retaliation for protected conduct; thus, the contract provision, although related to Title VII as found by the district court, see *Munday*, 858 F. Supp. at 1380-81, is not identical to § 2000e-3(a), and the district court properly found paragraph 4 to be enforceable independently.

We also reject as without merit defendants' assertion that the district court found Miss Munday's contract claim preempted by Title VII.

affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

No. 94-2192 - *AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS*

No. 94-2193 - *DISMISSED AS MOOT*

HEANEY, Senior Circuit Judge, concurring and dissenting:

I agree with the district court that Munday was constructively discharged from her employment at Waste Management. For over a year, Waste Management alienated Munday from her co-workers, creating intolerable working conditions that forced Munday to quit her job. I also agree that Munday has demonstrated retaliation in violation of 42 U.S.C. § 2000e-3(a) because the intolerable working conditions were orchestrated by Waste Management in response to Munday's filing of a discrimination claim against the company. Therefore, I respectfully dissent from the majority's opinion.*

With respect to the constructive discharge claim, the district court found that after Munday returned to work following the settlement agreement, Bohager set a plan into motion with the specific purpose of "gradually causing Munday herself to reach the conclusion that she could not continue her employment [with Waste Management]." *Munday*, 858 F. Supp. at 1372. Bohager instructed his drivers to have as little contact with Munday as possible both on and off the job and to "spy on her, to report her activity and comments to him, to watch, in effect, for every slip that she made." *Id.* Bohager targeted only Munday; he did not forbid his drivers from speaking or associating with anyone else. Although an employee is not guaranteed a working environment free of stress, Bohager's plan created exactly the type of environment this court has recognized as impermissible: "a calculated effort to pressure [Munday] into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by her co-

*Consistent with my views on Munday's Title VII claim, I concur in the majority's determination that Waste Management breached the April 1991 settlement agreement by retaliating against Munday for engaging in protected activity.

workers." *See Bristow*, 770 F.2d at 1255. I cannot imagine anything worse for an employee than to work in an environment in which co-workers refuse to speak or associate with her any more than is absolutely essential to carry out their respective jobs. In my view, Munday has demonstrated that Waste Management acted deliberately in creating a working environment in which she could no longer perform and that a reasonable person in Munday's position would have felt compelled to quit as a result of Waste Management's conduct.

The majority concedes that Bohager intended to persuade Munday to resign and that he successfully made her working environment unpleasant, but nonetheless rejects Munday's constructive discharge claim. In reaching its conclusion, the majority contends that the fact that Munday did not resign until December 1992, seventeen months after the events leading to and including the July 26th meeting, belies her assertion that she was forced to resign. This contention ignores the district court's specific finding that although a considerable amount of time passed between the meeting and Munday's resignation, Bohager continued to urge other employees not to have contact with her and to spy on her. *Munday*, 858 F. Supp. at 1375-76. The district court determined that during the entire time Munday worked for Waste Management after the settlement agreement, she had to cope with being ignored by her co-workers and her supervisor. *Id.* In light of its factual findings on the extent of Bohager's conduct, I agree with the district court that Munday was constructively discharged.

Similarly, the district court correctly determined that Waste Management retaliated against Munday because she filed a discrimination claim against the company. No one disputes that Munday engaged in protected activity by filing the claim. In discussing the breach of contract claim, the majority also concedes that Bohager's conduct was causally related to Munday's filing of the discrimination claim with the Office of Human Rights. My point of departure with the majority on Munday's retaliation claim therefore is exactly the same as I set forth in the above discussion. The majority rejects Munday's retaliation claim solely because it determined that Bohager's conduct did not rise to the level of an adverse employment action for Title VII purposes. In contrast, I believe that Munday has established that Waste Management took an adverse employment action against her

because Bohager's conduct set into motion a working environment so intolerable as to constitute a constructive discharge.

In light of my views on the liability issues, I must also address whether the district court erred in awarding of equitable relief and compensatory and punitive damages for conduct that occurred after November 21, 1991 and in denying front pay. I believe that the district court's award was appropriate in all respects, and I would affirm the damages as allocated.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAWN F. MUNDAY *

V. * CIVIL NO. K-92-467

WASTE MANAGEMENT OF NORTH AMERICA, INC., ET AL. *

*

Filed: August 1994

Harold R. Weisbaum, Esquire, Charles J. Goetz, III, Esquire, and Blum & Weisbaum, P.A., of Baltimore, Maryland, for plaintiff.

Russell H. Gardner, Esquire, Ann L. Lamdim, Esquire, and Piper & Marbury, of Baltimore, Maryland, for defendant.

KAUFMAN, Senior District Judge.

In the within case plaintiff, Dawn Munday, asserts that her employer, defendant Waste Management Company of Maryland, violated Title VII, 42 U.S.C. § 2000e, et IDA., and breached a settlement

agreement between her and her said employer. The case was tried before this Court, without a jury.' At the conclusion of trial, [1]

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[1] Originally, plaintiff asked for a jury trial in this case. Later, that jury demand was dropped. In any event, the parties agreed prior to trial that the trial should be nonjury in the light of the Supreme Court's decision in Landgraf v. USI Film Products, 128 L.Ed.2d 229 (1994). At the time the parties so agreed, it is only fair to state that the focus of the Court and counsel was on the Title VII aspects of the complaint in this case. The question of whether or not a jury trial was available in this case in connection with one or more of the breach of contract claims stated by plaintiff, see infra Part IV, was seemingly not considered by Court and counsel prior to trial. See Snider v. Circle K. Corp., 923 F. 2d 1091, 1095 n.8 (4th Cir. 1982). In view of the agreement of Court and counsel prior to trial that the case would proceed nonjury, this Court need not reach in the post-trial setting of this case the question of whether or not plaintiff would or would not have been entitled to a jury trial in connection with any of the alleged breaches of

this Court heard oral argument of counsel, originally took this case under advisement on July 18, 1994, and later, with the concurrence of all counsel, held the record open for additional evidence regarding damages incurred by plaintiff to and including July 26, 1994. In the light of the entire record in this case, and in accordance with applicable law, this Court hereby makes the following findings of fact, reaches the following conclusions of law, and determines that plaintiff is entitled to judgment to the extent set forth herein.

FACTS

Dawn Munday was hired by defendant Waste Management of Maryland, Inc.,

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contract in this case.

located in Elkridge, Maryland, in December, 1986. Defendant primarily operates a waste collection company. Until May, 1987, Munday worked as a truck dispatcher for defendant. In May 1987, the general manager of the Maryland facility, Robert Bohager, transferred Munday to Waste Management, Inc. of Greater Washington. While Munday asserts that she was transferred involuntarily, Bohager claims that when presented with the option to transfer voluntarily, she chose to relocate because the Greater Washington facility presented greater advancement opportunities.

After six months at the Greater Washington facility, and a promotion to a supervisory position, Munday decided to leave the Washington facility. She

states that the commute to the Washington facility from her home in the Baltimore area was simply too long for her; however, defendant suggested at trial that Munday had had problems complying with directions of the management at Greater Washington. After briefly working for a competitor of defendant, Munday called Bohager seeking to return to the Maryland facility. Bohager hired her as a truck driver in August of 1988, after warning her that her job duties would be tough ones. Subsequently, Munday began to experience what she perceived to be sexual harassment and discrimination.

At trial, Munday testified to a number of alleged acts of sexual harassment, including the following,

which occurred prior to May 30, 1989. First, John Utterback, a dispatcher at the Maryland facility who kept the key to the women's bathroom, regularly denied Munday access to the bathroom, which was the only women's bathroom on the premises. Moreover, Utterback repeatedly made comments to her such as, "How bad do you have to go?", and "Can't you hold it in ?". Second, she received less pay than her male co-workers.

Third, when she asked to have extra work assigned to her, Fred Heider, her immediate supervisor, remarked that she had "one strike against her because she was a woman" and that she should not be in her job "taking food out of the mouths of men." Fourth, when she was assigned additional work,

more often than not, her pay was not adjusted to compensate her for the added undertaking until she complained of the same. Fifth, her paperwork, including her route and schedule, was constantly placed in the "driver's lounge," which was in actuality the men's changing area and bathroom. Sixth, drivers and dispatchers made comments and jokes over the two-way
radio installed in every truck, including comments that Munday was "on the rag" and "under sexual pressures".

On May 30, 1989, Munday arrived for work and discovered that her regularly assigned truck had not been dumped by the previous day's driver and therefore would only have half its normal packing capacity. Utterback offered her a choice

of two other trucks, neither of which Munday found satisfactory for various reasons. Despite Utterback's instructions to Munday to wait at the truck dispatch site for an available truck, Munday walked off the job and said she was going home, informing the dispatcher to telephone her when the company had a truck in proper operating condition.

The events described above were brought to Bohager's attention during the afternoon of May 30, 1989, by the Operations Manager, Nicholas Zurkan. Bohager and Zurkan properly concluded that Munday's actions constituted insubordination. They held a meeting that day with Munday to afford her an opportunity to explain her actions, and

then informed her that company policy dictated that termination was their only recourse for an employee who walked off the job. As a result of the above events, Munday filed a claim of sexual harassment and discrimination with the Howard County (Maryland) Office of Human Rights.

Robert Coggins, an investigator for that office, notified the defendant of Munday's complaints, mailed defendant a letter of inquiry, and began his fact-finding investigation in March, 1990. other employees informed Coggins that Munday was constantly the subject of jokes and-that her paperwork was often left in the men's changing area. Fred Heider, Munday's immediate supervisor, initially told

Coggins that he had been admonished during a meeting with Bohager and Zurkan for his comments to Munday regarding the "one strike" against her and "food out of the mouths of men." However, Coggins testified that Heider later stated to Coggins that no such meeting had ever been held, that Heider had never been reprimanded, and that Heider was not willing falsely to testify under oath.[2]

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[2] According to Munday, Heider was the person who had, on one occasion, told her that she "had one strike against her" and that she should not be a driver "taking food out of the mouths of men." Munday reported that comment either to Bohager or Zurkan and was subsequently told by Zurkan that Bohager and Zurkan had met with Heider and reprimanded him for that comment. Munday asked for written confirmation of that reprimand and received a letter to that effect dated March 20, 1989. After Coggins commenced his investigation, Bohager, Zurkan and Heider told Coggins that the meeting had taken place and that

Heider had been reprimanded at the meeting. However, Coggins testified that prior to the commencement of the administrative hearing by the Howard County authorities, Heider had told Coggins that no such meeting had taken place and that Heider was not prepared to testify falsely under oath.

Kenneth Murdock, who was present at defense counsel table throughout the trial as the representative of defendant pursuant to Fed. R. Evid. 615(2), testified on direct examination, after hearing the testimony of Coggins, that Heider had never told him that Heider had lied about the meeting. However, on cross-examination, after being shown the transcript of his pre-trial deposition testimony, Murdock admitted that he remembered that Heider had told him of the alleged lie prior to the commencement of the Howard County administrative proceeding. When this Court asked Murdock how he could have failed on direct examination to remember what Heider had so told him, Murdock gave no clear answer to the question. Nor did Murdock state whether or not he had investigated Heider's admission to him, talked with Bohager and/or Zurkan about the same, or whether the defendant and its officials had considered what disciplinary action, if any, to take in connection with Heider's alleged lie or whether the meeting or reprimand had ever

been held or given. The record simply reveals that during September of 1991, Heider was terminated because he admitted, after Munday had lodged a separate, further complaint with Bohager, that Heider had, contrary-to Bohager's instructions, questioned Munday concerning the details of her April 19, 1991, settlement arrangement. See the discussion of the same, infra, in the body of this opinion. Counsel for both sides informed this Court that they had not been able to locate Heider so as to subpoena him to testify at trial.

Coggins testified at trial that he found heider's statement that no meeting had been held more credible than the statements of Bohager and Zurkan to the contrary. Under all of the circumstances, so does this Court. Coggins based his opinion concerning such credibility no only on the Heider incident, but also on what he perceived to be non-truthful statements made to him by Bohager and/or Zurkan concerning an occurrence which was related to whether or not a particular dump in the City of Baltimore was open at a particular time over a specific weekend. That factual dispute arose in connection with the complaint by Munday that, on one occasion, the truck assigned to her for use on a particular day was already partially loaded with refuse which should

Based upon the outcome of Coggins' investigation, the Howard County Office of Human Rights issued a reasonable cause letter in June of 1990. As a result, the Howard County Human Relations Commission scheduled a hearing in the Spring of 1991. After that hearing commenced, and just before Heider was to testify, the parties reached a settlement agreement. Pursuant thereto, the defendant agreed, inter alia, to expunge Munday's May 30,

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have been dumped. See the discussion, supra, in the body of this opinion. The totality of the evidence indicates, however, that the dump was, indeed, closed at the time Bohager and/or Zurkan stated that it was closed. Accordingly, in this Court's view, Coggins' opinion concerning lack of credibility of Bohager and Zurkan was not justified with relation to the dump issue. However, in this Court's view, Coggins' opinion was more than justified with relation to the Heider matter.

1989 discharge, to reinstate Munday, to provide appropriate restroom facilities, and not to engage in any retaliation against Munday for her filing of sex discrimination complaint with the Howard County authorities.[3]

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[3]Murdock testified that, as the regional human relations counselor of defendant for the eastern section of the United States, including Maryland, he advised his superiors that the company should be able to win the Howard County case and therefore should not settle it. However, Munday, prior to the time the Howard county administrative hearing commenced, had apparently engendered considerable publicity for herself concerning her claims of sex discrimination by defendant. Against that background, top national officials of defendant's parent company, determined that, if possible, Munday's complaint should be settled and not litigated to conclusion before the Howard County authorities. While Murdock testified that he understood the reasons for that decision --despite his disagreement with it -- and Bohager testified that he had no opinion one way or another as to whether the settlement

After the settlement agreement was signed, Munday and defendant agreed that Munday would return to work on July 8, 1991. Prior to her return on that date, defendant held a safety meeting on June 20, 1991. Bohager and Chad Johnson, the operations manager at that time, attended the meeting, as did Heider, Ed Stevenson (another supervisor) , and approximately 30-35 drivers. At the meeting, Johnson informed the drivers that Munday would be

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should have taken place, the demeanor of both Bohager and Murdock during trial leads this Court to conclude that both Murdock and Bohager, and particularly the latter, were most disturbed by the Settlement Agreement. This Court further concludes that Bohager determined that when Munday returned to work, Bohager would, without getting himself into trouble, handle Munday in such away that she would find work sufficiently unpleasant and would, given sufficient passage of time, herself determine not to continue her employment by the defendant.

returning to work and that defendant would not tolerate bad language, taunting, or sex-oriented rumors concerning Munday. Bahager then addressed the drivers. According to the testimony of Johnson and a driver named Brian Flynn, Bohager told the assembled drivers to have as little to do with Munday as possible and not to socialize with her as they did with other drivers and had done with Munday prior to her May 30, 1989, discharge. In contrast, Bohager and David Campbell, another driver, testified at trial that Bohager only informed the drivers that they were not to talk to Munday concerning the terms of her settlement with defendant.

Upon Munday's return to work, defendant had processed little if any of

her paperwork, had not conformed her pay rate to the rate agreed upon at settlement, had not activated or brought up to date her medical benefits, and had not ordered her a uniform. All of those problems were eventually straightened out, largely with the assistance of Johnson upon his return from vacation on July 15, 1991. At trial, Munday also stated that upon her return to work, the new women's bathroom facility was located in a trailer in an unsafe, dark area, lacked proper supplies, and was not hooked up to the water supply. The bulk of her complaints to defendant concerning the bathroom facilities were eventually remedied. Munday also contended that upon her return other drivers refused to talk to her, going so far as to ignore

her greetings. Munday stated that at one point certain drivers apologized for not talking to her and told her that Heider had ordered them not to speak to her. At least one employee told Munday that Bohager had instructed other employees to report back to Bohager anything which Munday said to any of the employees. At trial, Bohager denied having given such instructions to the other drivers; however, Bohager's somewhat angry and rather clearly resentful demeanor at trial, combined with his uncooperative behavior during discovery of this case, and his testimony concerning the Heider incident related in footnote 2, supra, causes this Court largely to discredit Bohager's testimony regarding his instructions to the other drivers and

regarding certain other parts of his trial testimony.

On July 26, 1991, Munday was driving with Heider. Throughout the day, Heider badgered her with questions concerning the amount she had received in her settlement. Heider also informed her that Bohager had instructed the other drivers "not to talk to the bitch," and that Bohager had told Heider that he wanted to get rid of Munday before she could "retire on the company." After completing her assigned route, Munday attended a previously scheduled meeting between herself, Bohager, and Johnson. Munday and Johnson believed that the meeting was scheduled to address Munday's numerous aforementioned complaints. However, at the meeting, according to

Munday and Johnson, Bohager exploded at Munday, yelling that he had heard a rumor that Munday had stated that she would be suing defendant again. He demanded that she admit such an intention. Munday denied that she had made any such statement or had any knowledge of the rumor. When she attempted to get Bohager to address her concerns, Munday testified that Bohager stated that he "didn't give a shit," about her problems. Bohager denied such yelling and such statement. This Court, however, credits as credible the version of the meeting related by Munday and Johnson.

Munday was placed on off-work status by her physician from August 1991 until March 1992. During that time, Munday had numerous difficulties securing her

disability benefits, all of which were eventually resolved. on January 30, 1992, Munday called a fellow employee, Dolly Fotta, and recited to Fotta her litany of woes concerning her employment with defendant, particularly her problems with her medical insurance. During that conversation, Munday stated that she could relate to incidents recently publicized in the media concerning employees who had shot their employers. Fotta called Murdock and Dennis Van Every, the Regional operations vice President, and informed them of the details of her conversation with Munday.

Munday's physician gave her a return to work slip effective March 11, 1992. Bohager did not permit plaintiff immediately to return to work; rather, he

stated that she must have an independent medical and psychological examination conducted by doctors selected by defendant. Munday contends that no male employee ever had to have an independent medical examination upon the end of a disability period, but that an employee could simply get a treating doctor to vouch for the employee's return. Defendant contends that such examination was warranted in the light of the alarming statements made by plaintiff to Fotta. This Court, in that regard, concludes that defendant acted reasonably. In any event, after the examinations, Munday returned to work on March 23, 1992.

On March 23, 1992, Munday was placed on the recycle route. At trial, she

testified that drivers still refused to talk to her, the driver who was training her refused to help her sequence her stops,[4] several of her extra stops were not logged, there were rumors spread among other employees that, on the one hand, she was homosexual, and on the other hand, she had sex on the Elkridge premises with one or more male employees, and she was unfairly reprimanded over the radio by her immediate supervisor, Jimmy Ponton. Munday contends that male employees were not subjected to such treatment. However, the testimony of witnesses for defendant, largely

[4]The sequencing of a route involves arranging each stop on the driver's list in an order which allows the driver to service each stop in the most efficient manner.

unrebutted by Munday, is that all of plaintiff's aforementioned complaints were investigated and those which proved to have merit were remedied with reasonable promptness.

Plaintiff was again absent from work from April 10, 1992, until April 23, 1992, with a work-related knee injury. Following her return, Munday testified that she did not receive a promotion into either of two available positions despite the fact that she believes that she was more qualified than those who received the jobs. However, in the light of her many absences, and her lack of reliability, defendant's determination that Munday was not qualified for those positions appears valid. Munday also contends that defendant did not provide

her with light duty work on May 6, 1992, and instead sent her home. She argues that other similarly injured employees received light duty positions. However, the testimony of witnesses for defendant reveals that defendant reasonably accommodated Munday with available limited duty work, and eventually had to send her home when no other work of that nature was available. Further, upon being sent home, Munday cursed at her immediate supervisor, Ponton.

Munday returned to work on August 17, 1992, and was placed back on the recycle route, rather than the route she requested. Her preferred route had already been given to another employee. Munday testified that on the recycle route she had to drive with a driver who

scared her by dangerous driving and by threats, that she had to pick up contaminated loads when she drove alone, and that her immediate supervisor ignored her complaints. Again, Munday states that no male employees were subjected to those conditions. The record indicates that each and all of such complaints by Munday were investigated appropriately by one or more supervisory employees, that Munday was informed of the same, and on some occasions indicated she was satisfied with the handling of complaints, and on others that she was not so satisfied.

on September 29, 1992, Munday left work and was placed on disability leave after suffering so-called panic attacks while driving her route. Munday began a

new job on October 26, 1992, with East Coast Sweeping, but it was not until December 7, 1992, that she informed defendant that she was resigning from employment by defendant.

During trial two psychologists, Dr. Lawrence Adler and Dr. John Lion were called to the witness stand respectively by plaintiff and defendant. Dr. Adler treated Munday over a period of many months. Dr. Lion saw her only twice after being retained by defendant for purposes of this litigation. one or both of the two doctors related Munday's employment difficulties, her life long tensions with her mother, her mother's death from cancer during Munday's employment with defendant, her divorce at an earlier time, sexual advances made by

an aged uncle, a break-up with a longtime boyfriend, and her general dissatisfaction with life. Dr. Adler diagnosed Munday as having experienced a major mood disorder and post-traumatic stress disorder during her employment with defendant, and for at least a few weeks after Munday terminated her employment there. Dr. Adler concluded that those emotional illnesses were principally caused by sex discrimination and sexual harassment on the job. In contrast, Dr. Lion expressed the view that Munday had experienced a temporary period of emotional stress during her period of employment by defendant and that such stress did not arise at any time to the level of major mood disorder or post-traumatic stress disorder. Dr.

Lion stated that although the stress which Munday experienced prior to the end of her employment relationship with defendant was caused in part by her perceptions of on-the-job sex discrimination and sexual harassment, Dr. Lion was unable to reach an opinion as to how much of the stress was attributable to the non-job-related problems which Munday had experienced and was experiencing. This Court has great respect for the opinions of both doctors, and notes that Dr. Adler, as the treating psychiatrist, had much more opportunity to observe Munday and to evaluate her complaints than did Dr. Lion. However, this Court nevertheless is of the view that Munday convinced Dr. Adler that her complaints and perceptions concerning sex

discrimination and sexual harassment were correct to a greater degree than this Court finds it possible to accept. In that context, this Court largely adapts Dr. Lion's views.

This Court has little question but that Munday was subjected to many inappropriate comments and actions concerning gender while she was employed by defendant. Those occurrences should, of course, not have taken place. But, in the view of this Court, the totality was not "sufficiently severe or pervasive "to alter the conditions of [Munday's] employment and create an abusive working environment". Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (citation omitted). This Court's views in that regard relate to the period prior

to Munday's discharge on May 30, 1989, and also to the period commencing with her return to work on July 8, 1991, following the Settlement Agreement of April 19, 1991. During both periods, Munday herself greatly contributed to the difficulties of which she complains by her own abrasive conduct and by her tendency to blame her problems on others and to assume little responsibility for her own errors, as well as by her general dissatisfaction with her life. In addition, the type of employment involved was difficult and demanding, and the entire work atmosphere can only be described as a rather tough one. The testimony of one or more witnesses who are still employees of defendant indicated their reluctance to become

involved in the difficulties of Munday and/or other employees and a desire to avoid jeopardizing their own employment positions with a company which apparently experiences considerable job turnover.

It is to be noted, also, that Bohager, as General Manager of the Elkridge, Maryland facility, could easily have rejected Munday's application to return to work at that facility following her dissatisfaction with the job she took after she left the Washington facility. The entire record does not reveal any general discriminatory pattern on the part of defendant against employment of women, in terms of hiring, status on the job, promotion, or the like. Nor does the entire record support Munday's view of a general pattern of sex harassment.

Rather the record discloses a tough, earthy atmosphere in which there were undoubtedly statements and questions which would have grated upon a reasonable woman. But those comments in no way added up to a "pervasive" atmosphere of sex discrimination or sexual harassment.

After Munday's return to work in July, 1991, following the Settlement Agreement, what occurred was not sexual harassment or sex discrimination, but rather, a pattern of conduct orchestrated by Bohager of retaliation against Munday with the purpose in mind of gradually causing Munday herself to reach the conclusion that she could not continue her employment by defendant. While Bohager from time to time assigned supervisors to try to take care of

Munday's complaints to the fullest extent possible, Bohager at the same time instructed persons working for him to spy on Munday, to report her activity and comments to him, to watch, in effect, for every slip that she made, and to treat her on an isolated basis. While this Court notes the differences in testimony of certain witnesses in that latter regard, this Court has little doubt but that Bohager did give instructions to isolate Munday as much as possible. A number of Munday's complaints -- such as those concerning bathroom facilities and her medical insurance -- involved problems which were reasonably handled by the company, although sometimes more slowly than should have been the case overall, Bohager was careful not to leave

a trail of unfair treatment of Munday in those regards. Rather, he pursued a slower and more careful approach, particularly after his totally unjustified outburst during the July 26, 1991, meeting which he held with Johnson and Munday. In sum, this Court has little or no doubt that Bohager pursued, from the moment of the Settlement Agreement, a program and policy of retaliatory action against Ms. Munday because of her complaint to the Howard County authorities following her May 30, 1989, discharge and because of his dissatisfaction with the settlement agreement.

I. SEX DISCRIMINATION AND SEXUAL HARASSMENT

Munday alleges that during her

employment with Waste Management she was subjected to sex discrimination and sexual harassment which resulted in a hostile work environment in violation of Title VII. The alleged harassment includes the lack of cleanliness and supplies in the women's bathroom, the lack of attention to her medical benefits and her pay rate upon her return, the dispatcher's failure to log Munday's stops, her supervisor's refusal to help her sequence her stops, and sexual rumors concerning both Munday's sexual preference and alleged affairs between Munday and other employees. The Supreme Court, in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986), held that "a plaintiff may establish a violation of Title VII by proving that discrimination

based on sex has created a hostile or abusive work environment." See also Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victims] employment and create an abusive work environment.'" Meritor, at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). In Harris v. Forklift Systems, Inc., 126 L.Ed-2d 295 (1993), the Supreme Court elaborated upon the standard of a hostile environment, stating that:

> [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work

performance. Id. at 302.

To establish a prima facie showing of sexual harassment, a plaintiff must show "that the conduct in question was unwelcome, that the harassment was based on sex, and that the harassment was sufficiently severe or pervasive to create an abusive working environment" and that there is "some basis for imposing liability on the employer." Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir.1987) (citing Henson, 682 F. 2d at 903-04). Defendant may rebut the prima facie showing "'directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial.'" Raley v. Board of St. Mary's County Comm'rs, 752 F. Supp. 1272, 1279

(D. Md. 1990) (quoting Katz, 709 F.2d at 256). If the plaintiff shows that the employer knew of the harassment and failed to act, the defendant may rebut that showing by demonstrating "the taking of 'prompt remedial action reasonably calculated to end the harassment.'" Id.

Munday has failed to establish by a preponderance of the evidence the prima facie elements of sexual harassment. The actions she complains of, such as a delay in getting benefits or the lack of bathroom supplies, are the sorts of aggravating circumstances which occur in many workplace environments and simply do not constitute an all pervasive, abusive working environment. Further, when Munday complained about those mix-ups to her immediate supervisors, they remedied

or sought to remedy her complaints, and often, Munday expressed satisfaction with the way in which those problems were handled. The fact that Munday got caught up in the defendant's red tape on more than one occasion does not satisfy the requirement that the harassment was based upon sex.

Munday also complains that she was treated differently than male drivers because she did not get help sequencing her route, her logs were not correctly handled, she had to pick up contaminated loads, and she was reprimanded over the radio. However, the testimony of defendant's witnesses at trial shows that either those events did not occur, or that male drivers suffered the same perceived indignities as plaintiff.

Moreover, the testimony at trial also revealed that Munday was a difficult and demanding employee who complained to her superiors at the slightest provocation of what she regarded to be sex discrimination or sexual harassment. As a result of her workplace demeanor, she appears to have herself initiated many of the perceived -- and sometimes real problems which she claims she suffered. The evidence does not show that Munday was treated differently because of her sex; rather, to the degree she suffered unwelcome behavior, it appears that one or more of her supervisors, particularly Bohager, was motivated by personal dislike of Munday.

Munday also asserts that rumors regarding her sexual activity continued

to spread until her eventual resignation from employment with defendant. Munday, in at least a number of those instances, did not identify who was spreading those rumors or how she heard of them. In any event, those alleged rumors do not rise to the requisite level of pervasiveness. "Mere utterance of an epithet which engenders offensive feelings in a female employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.11 Pagana-Fay v. Washington Suburban Sanitary Comm'n, 797 F. Supp. 462, 468 (D. Md. 1992) (citing Vinson, 477 U.S. at 67). Accordingly, this Court concludes that Munday has not established a prima facie claim of sex discrimination or sexual harassment.

II. RETALIATION

Munday alleges that defendant retaliated against her in response to her filing of sex discrimination charges with the Howard County office of Human of Rights and the resulting settlement agreement dated April 19, 1991. Under Title VII, 42 U.S.C. § 2000e-3 (a), it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

To fulfill the prima facie

requirements of a retaliation claim, a plaintiff must demonstrate three elements: it 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). Defendant does not dispute that Munday satisfies the first prong of the prima facie test. Munday, by filing a sex discrimination complaint with the Howard County office of Human Rights, clearly engaged in activity protected under Title VII.

With regard to the second element, this Court finds that Bohager took adverse employment actions against

Munday, which include yelling at her during the July 26, 1991, meeting, directing other employees to ignore her and to spy on her, and generally refusing himself to communicate with her concerning her employment related complaints, even though some of them were not meritorious. Upon Munday's return to Waste Management in July 1991, Bohager set in motion a pattern of retaliation, exemplified primarily by his refusals on at least certain occasions to deal directly with Munday and his not-so-subtle suggestion that other employees should do the same. In effect, Bohager had knowledge of a number of Munday's employment related and non-employment related problems and failed to act appropriately in a number of instances in

the expectation that those problems would eventually wear down Munday and force her to quit. His retaliatory plan eventually worked; his adverse employment actions against Munday continued into September 1992, at which time she ceased working for defendant.

As to the third prima facie element, defendant asserts that plaintiff has not demonstrated a causal connection between her filing of an employment discrimination charge and Bohager's adverse actions against her. However, several factors indicate to the contrary. To begin with, upon Munday's return in July 1991, her paperwork was largely incomplete, no uniform had been ordered for her, and her pay rate had not been adjusted in accord with the settlement

agreement. Defendants' lack of preparation upon Munday's return displays a lack of concern by defendant with abiding by the terms of the settlement agreement. The testimony of witnesses for defendant shows at most that various high-level persons at Waste Management passed off to other employees responsibility for Munday's return, and that, in fact, those in charge did not check to confirm whether such preparation had or had not been made. Additionally, at the July 26, 1991, "meeting" between Bohager, Johnson, and Munday, Bohager yelled at Munday concerning rumors to the effect that Munday would be suing the defendant again. The content of Bohager's attack on Munday, combined with his tone of voice at that meeting, links

his anger over the settlement agreement with his retaliatory actions against Munday. Finally, Bohager's instructions to other employees not to have normal relations- with Munday and to report back to him all of her actions, further indicates his intention to retaliate against Munday for lodging her complaint with the Howard County authorities and for achieving the April 19, 1991, settlement. Accordingly, Munday has satisfied her burden of establishing a prima facie case of retaliation.

Under the burden shifting scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applicable in retaliation cases, defendant may rebut a prima facie case of retaliation by demonstrating "a legitimate

nondiscriminatory reason for the adverse action." Ross, 759 F.2d at 365. However, defendant has not sufficiently done so in this case. Although Munday was hardly a model employee, her behavior at Waste Management in no way called for Bohager to yell at her an July 26, 1991, or to direct other employees to ignore her and to spy upon her. Thus, this Court concludes that Munday has established by a preponderance of the evidence that the "adverse action would not have occurred 'but for' the protected conduct," ie., her filing of charges with the Howard County Office of Human Rights which resulted in the settlement agreement of April 19, 1991. Ross, 759 F.2d at 366. Accordingly, the third Ross element has been satisfied by plaintiff.

III. CONSTRUCTIVE DISCHARGE

Munday contends that defendant's sex discrimination, sexual harassment, and retaliatory conduct resulted in her constructive discharge. Because this Court has concluded that neither sex discrimination nor sexual harassment occurred in this case, this Court will consider her constructive discharge claim only with regard to the retaliatory pattern of conduct by defendant. "A constructive discharge occurs when 'an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job."' Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1082 (1986). "A plaintiff alleging

constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." Id.

Munday has proved by a preponderance of the evidence that defendant acted deliberately, ie., defendant had the "specific intent to force [her] to leave." Id. (citing J.P. Stevens & Co., Inc. v. NLRB, 461 F. 2d 490, 494 (4th Cir. 1972)) . Bohager's retaliatory actions, described supra, were provoked by his displeasure with Waste Management's decision to settle with Munday and his personal dislike of Munday. Moreover, his inactions in the light of full knowledge of Munday's troubles, both within and outside of the workplace, further indicate his intent to

force her to quit.

As to the intolerability of the working conditions, plaintiff must show that a "'reasonable person, in the employee's position would have felt compelled to resign." Id. (citations omitted). "[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge." Id. After considering all of the evidence in this case, this Court concludes that a reasonable person in Munday's position would have felt compelled to quit as a result of Bohager's outward antagonism and retaliatory conduct, even though Munday mistakenly, in this Court's opinion, wrongly viewed such antagonism and retaliatory conduct as based on sex

discrimination and sexual harassment. Although a considerable amount of time passed between the July 26, 1991, "meeting" and Munday's resignation, Bohager continued to urge other employees not to have contact with her and to spy on her. Thus, throughout her tenure at Waste Management, she had to cope with being ignored both by her co-workers and by the top supervisor at the Elkridge facility. Under those circumstances, the atmosphere of the workplace was rendered objectively intolerable in so far as Munday was concerned. Accordingly, this Court concludes that Munday was constructively discharged from Waste Management.

IV. BREACH OF CONTRACT

Munday maintains that defendant

breached three provisions of the April 19, 1991 settlement agreement. First, she asserts that defendant breached ¶ 3A of the agreement, which provided that "a written letter of reinstatement from [Waste Management] at the time of her return to work . . . will be placed in her file." She states, and the record in this case no way indicates to the contrary, and therefore this Court has no reason to doubt, that she did not receive a letter to that effect until September of 1991, two months after she returned from work. However, she concedes that any damages arising out of that breach are nominal at most.

Second, Munday contends that defendant failed to provide her with an adequate restroom and changing area in

compliance with ¶ 3(g). However, the testimony of Mr. Coggins, the Howard County Investigator, reveals that within a reasonable time period after Munday's July 1991 return to work, the bathroom facilities were adequate. On the whole, Munday's complaints concerning the bathroom were eventually reasonably addressed.

Finally, Munday claims that defendant violated ¶ 4 of the agreement which provides that the defendant "agrees that there shall be no discrimination or retaliation of any kind against any person because of lawful opposition to any practice declared unlawful under . . . Title VII, or because of the filing of a charge, giving of testimony or assistance, or participation in any

manner in any investigation, proceeding or hearing under ... Title VII." As this Court has concluded in Part II, supra, defendant retaliated against plaintiff in response to her filing of a charge of discrimination with the Howard County Office of Human Rights and the ensuing settlement. Accordingly, defendant breached its contractual duties as set forth in ¶ 4 of the April 19, 1994, settlement agreement.

V. DAMAGES

Plaintiff is entitled to the award of damages for retaliation and for constructive discharge, in violation of Title VII, and for defendant's breach of contract. The breach of contract, ie., breach of the Settlement Agreement of April 19, 1991, consists of the

retaliatory conduct by defendant.

Title VII

Prior to November 21, 1991, the effective date of the Civil Rights Act of 1991, a Title VII plaintiff could only obtain equitable remedies, such as back pay and reinstatement. See Landgraf v. USI Film Products, 128 L.Ed.2d 229, 245 (1994). Thus, prior to November 21, 1991, plaintiff could not receive compensatory damages, as such, as for example, for emotional or psychological distress, or any punitive damages. With regard to the post-November 21, 1991, period, however, plaintiff is entitled to obtain not only appropriate equitable relief, but also compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish,

loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b) (3). Furthermore, under the Civil Rights Act of 1991, plaintiffs may recover punitive damages if she can show that defendant acted "with malice or with reckless indifference to the federally protected rights" of plaintiff. 42 U.S.C. § 1981a(b)(1).[5]

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[5] In Landgraf, the Supreme Court held that the Civil Rights Act did not apply retroactively to cases pending on November 21, 1991, the effective date of the Act. Landgraf was a case pending on November 21, 1991, involving discriminatory actions all of which occurred prior to that date. In contrast, the within case pertains to conduct which occurred both before and after November 21, 1991. Moreover, the within case was not pending on November 21, 1991, but was filed after that date. Throughout his opinion in Landgraf, Justice Stevens disapproved of retroactively applying new laws "to conduct that occurred at an earlier date," 128 L.Ed.2d at 247, and strongly

With regard to equitable relief, counsel for the parties have agreed that plaintiff started her new job with East Coast Sweeping on October 26, 1992, and that she has received payment from defendant of all pay that she is entitled to receive up to and including that date. Accordingly, Munday is entitled to receive the pay which she would have

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affirmed the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." Id, at 260. Justice Stevens stressed that persons should be governed by the law in effect at the time at which they act. Id. at 264. Accordingly, this Court concludes that the Civil Rights Act of 1991 does not entitle plaintiff to any damages, compensatory or punitive, for any of defendant's conduct which occurred prior to November 21, 1991, and for which damages were not available under the provisions of Title VII in force and effect prior to and up to that date.

received from October 26, 1992, to and including the date of judgment in this case, namely, July 26, 1994.[6] In that

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[6] The general rule is that the back pay period ends on the date of the court order authorizing back pay and determining other appropriate relief, although the courts have used a variety of other dates or events to terminate the back pay period. In some older cases, the date of filing the complaint or the date of trial were sometimes used. Measuring the period by these dates, though, is less consistent with the 'make whole' purposes of Title VII.

2 Arthur Larson and Lex K. Larson, Employment Discrimination § 55.37(a)(2), at 11-96.43 to 11-96-45 (1994) (footnotes omitted).
This Court and counsel had contemplated that this opinion would be filed on July 26, 1994, but certain delays occurred before the parties agreed upon the said back pay figure. While for all other purposes, including calculation of appeal time under Fed. R. App. P. 4(a), the date of filing is the judgment date, the date of July 26, 1994, is referred to in

regard, counsel for the parties have agreed that amount is $17,183.47, and that it includes the difference between what plaintiff would have earned from October 26, 1992, to July 26, 1994, if she had worked for defendant during that period instead of East Coast sweeping. It is to be noted that the parties have agreed that plaintiff was paid less during that period by her new employer than she would have been expected to have earned if she had worked during that period for defendant.

Plaintiff has not sought reinstatement of her job with Waste Management, and defendant agrees with her

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this opinion as the judgment date with respect to the end of the back pay period.

that such equitable relief would be inappropriate. Plaintiff instead seeks front pay which "is considered the equitable equivalent of reinstatement" and is awarded "when the remedy of reinstatement is simply not appropriate, usually because of the hostility that has developed between the parties." Larson § 55.39, at 11-96.121. Plaintiff originally asserted that she was entitled to "front pay" from the date of judgment in this case through her work life expectancy on a present discounted value basis. However, after considering the existing case law and treatise authority, plaintiff has reduced her request for front pay to a period of four years from the date of judgment, a request defendant wholly opposes. In the view of this

Court, this is not a case in which the award of any front pay is appropriate. Front pay should be utilized as a remedy only when reinstatement is not possible, and also should not be awarded, unless, in the discretion of the court, it produces an appropriately equitable result. In this case, in the opinion of this Court, if Munday had returned to work in July, 1991, after the April, 1991, Settlement Agreement, and if the defendant, under the guidelines and direction of Bohager, had not engaged in a pattern of retaliatory conduct against plaintiff, Munday's own inabilities to get along with other people would, in the workplace atmosphere of the Elkridge facility, have resulted in her not being able to stay with such employment for

long.

Munday returned to work July 8, 1991. She was off work because of physical and other disabilities from August 1, 1991, to March 11, 1992. She worked from March 23, 1992, and was off work again from April 10, 1992, to April 23, 1992. She then was off work from May 6, 1992, to sometime in August, 1992, because defendant had no light duty work for plaintiff to perform in her disabled condition. She then returned to work until September 29, 1992, her last day with defendant, and started her new job on October 26, 1992.[7]

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[7] Bohager's last day with the company before he left was November 17, 1992. The reason for Bohager leaving the company would not appear very relevant or material with regard to the issues before this Court for decision in this case.

Munday will receive an award of back pay through the date of judgment in this case. That results in her being paid as if she had worked up to July 26, 1994. Thus, she will be paid not only for all periods of disability or unavailability of appropriate work during the Spring and Summer of 1992, but also as if she had worked for defendant to and including October 26, 1992. That means she will receive pay for about a year and three-quarters, after October 26, 1991, which provided to her more than ample time to regroup within the employment market and

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Bohager's testimony indicated that he left to take care of family affairs and not for any other reason. Plaintiff questions whether there were not other reasons for his departure, including friction between Bohager and other management officials of the defendant company.

to become established in her new employment following her leaving the employ of defendant. The relevant cases teach us that Munday is entitled to receive no more than that, namely, pay on an equitable basis while she in effect "regroups." Therefore, this Court concludes that plaintiff should not be awarded any pay following the date of judgment in this case, namely July 26, 1994. See generally, McKnight v. General Motors Corp., 973 F.2d 1366,1369-1372 (7th Cir. 1992) , cert. denied, 113 S.Ct. 1270 (1993); Patterson v. American Tobacco Co., 535 F. 2d 257, 269-70 (4th Cir. 1976), cert.

denied, 429 U.S. 920 (1976).[8]

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[8] See also Bailey v. Container Corporation of America, 660 F.Supp. 1048, 1053-54 (S.D. Ohio 1986); Goss v. Exxon Office Sys. Co., No. 82-3156, 1983 WL 612, at *9-10 (E.D. Pa. July 1, 1983); Griffin v. George B. Buck Consulting Actuaries, Inc., 566 F. Supp. 881, 882 (S.D.N.Y. 1983) ; Larson § 55.39, at 11-96.125.

Commenting in Goss with regard to "front pay" Judge Newcomer stated: "I believe it would require excessive speculation to make such an award (for front pay] . . . . Compensation in the sales business depends on a number of factors other than the individual salesperson's ability. . . . There is no evidence from which I can make a reasonable projection . . . ." Id. at *10. While plaintiff's work with defendant is not related to sales, it would, in the view of this Court, also be quite speculative for this Court to try to determine what plaintiff will earn after July 26, 1994. In that regard, there is evidence in the record that plaintiff's compensation while working for defendant was higher than it would have been if she had worked before that date for her current employer because of overtime work at overtime pay rates. Whether that fully explains the lesser amount of earnings by plaintiff in her present job as compared her earnings from

As discussed supra, plaintiff is entitled to receive compensatory damages for psychological harm resulting from defendant's conduct in violation of Title VII which conduct occurred after November 21, 1991. If the federal statutory changes which became effective on November 21, 1991, had been in effect during the entire period affected by defendant's retaliatory conduct, that is, from July 8, 1991, to and including July 26, 1994, this Could would award plaintiff $50,000. Breaking down that award into the pre and post-November 21, 1991, parts of that period, this Court

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defendant is not entirely clear. But that is an example of one of many factors which pertain to the speculative nature of predicting what plaintiff will earn after July 26, 1994.

allocates $30,000 for the period from July 8, 1991, to November 21, 1991, and $20,000 for the period from November 21, 1991, to July 26, 1994. While the pre-November 21, 1991, period is considerably shorter in time than the post-November 21, 1991, period, it was during the former period that the most egregious acts of discrimination orchestrated by Bohager took place and that plaintiff suffered the greatest psychological harm. During the post-November 21, 1991, period, Bohager simply allowed matters to drift, resulting in conditions which made it intolerable for Munday to continue her employment by defendant.

In setting the amount of psychological and/or emotional damages at $50,000, this Court concludes that that

is a fair amount to award to a person who was subject to retaliatory conduct of a nature which no reasonable employee should be expected to put up with and which indeed, on a subjective basis, Munday found it not possible to accept. The $50,000 amount would not, in this Court's opinion, be sufficient if this Court accepted Dr. Adler's opinions concerning major mood disorder and/or post traumatic stress disorder. However, the $50,000 is, in this Court's view, a fair award for the type of emotional upset consistent with Dr. Lion's views.[9]

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[9] In order to establish liability for conduct involving sexual harassment, all that is needed in that "the environment would reasonably be perceived, and is perceived, as hostile or abusive . . ., there is no need for it also to be psychologically injurious." Harris, 126 L.Ed-2d at 302. But if it is

In that regard, this Court notes that if it were convinced, as Dr. Adler is, that Munday was subjected to pervasive sex discrimination and sexual harassment while on the job, this Court would have different views concerning the amount of damage suffered by Munday.[10] But this Court, as related supra, does not believe

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"psychologically injurious" that, of course, provides a basis for increased damages. Herein, plaintiff's psychological stress, to the extent Dr. Lion opined that the same occurred, is taken into account by this Court in arriving at the $50,000 figure.

[10] Under the provisions of the federal legislation which became effective on November 22, 1991, there is a cap placed upon compensatory damages depending upon the number of employees employed by defendant. In this case, those cap provisions are above the amount of compensatory damages awarded by this Court in accordance with this opinion; accordingly, the cap provisions do not have any effect in this case. 42 U.S.C. § 1981a(b)(3).

that the conduct of defendant rose to the level indicated by Dr. Adler.

That leaves for determination the question of punitive damages. As noted supra, punitive damages are not available under the federal statute for conduct which occurred prior to November 21, 1991. However, they are so available for conduct after that date. In this Court's view, the lack of evidence in the record indicating any change in the pattern of retaliatory conduct after Munday returned to work on July 8, 1991, and before she took her new job on October 26, 1992, requires the finding that such retaliatory conduct continued throughout that period. In that context, this Court is of the view that punitive damages should be awarded with regard to the

post-November 21, 1991, period, in the amount of $40,000, representing 40% of what this Court believes is an appropriate punitive damage amount for the entire period from July 8, 1991, to October-26, 1992, namely $100,000.[11]

Breach of Contract

As discussed supra, compensatory damages for emotional stress and punitive damages resulting from defendant's pre-November 21, 1991, conduct are not available to plaintiff under Title VII. The question, however, arises as to whether such damages for that period are available under Maryland law for breach

[11] In that regard, this court is utilizing the same 40% approach with regard to punitive damages as it has, supra, in connection with compensatory damages.

of defendant's duty not to retaliate. In Maryland, compensatory damages for "emotional disturbance" resulting from breach of contract are recoverable only if "the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353.[12] In this Court's view, defendant's

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[12] See also Jih v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 320 (D.Md. 1992). By inadvertent error, the citation at page 320 in that case is to § 31 of the Restatement (Second) of Contracts rather than to § 353. Also, at page 320, there is an indication that damages for such psychological harm are not available in a contract action under Maryland law "unless the breach was wanton or reckless and caused bodily harm and the defendant had reason to know at the time the contract was made that breach would cause mental suffering for reasons other than mere pecuniary loss." (Emphasis added).

conduct in this case meets that test, particularly since Bohager and other supervisory employees of defendant were aware of plaintiff's many emotional problems. As to punitive damages, they may not be recovered under Maryland law for breach of contract in and of itself unless such breach of contract is "for a tort related to a contract claim" and is accompanied by" "proof of actual malice.'" Sibley v. Lutheran Hospital of Maryland, Inc., 709 F. Supp. 657, 662 n.7 (D. Md. 1989) (citations omitted), aff'd, 871 F.2d 479 (4th Cir. 1989); see also Owens-Illinois v. Zenobia, 325 Md. 420, 460 n.21 (1992). In the within

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Pursuant to § 353, it is clear that the above-quoted word "and" should have been "or."

case, this Court has little question but that the actions of Bohager and other supervisory employees were motivated by "actual malice." particularly in the light of Bohager's dislike of Munday. Also, defendant's breach of contract by way of retaliatory action would appear to be a "tort related to a contract claim," Sibley, 709 F. Supp. at 662 n.7, even though the type of tort involved is not a common law tort, but a federal statutory tort, i.e. , a violation of Title VII.

Thus, compensatory damages for psychological harm and also punitive damages are available to plaintiff with regard to defendant's breach of its contractual undertaking not to retaliate, as set forth in the April 19, 1991, settlement agreement, not only with

regard to the post-November 21, 1991, period, but also the pre-November 21, 1991, period, if Maryland law governs. The question arises, however, as to whether Maryland or federal legal principles apply with respect to the pre-November 21, 1991, period. "A negotiated settlement agreement is a contract, and a private party to such a contract may sue to enforce it like any other contract." Larson § 48.24, at 9A-119. "Although Title VII settlement agreements are contracts, they are inextricably linked to Title VII. Federal common law governs the enforcement and interpretation of such agreements because the 'rights of the litigants and the operative legal policies derive from a federal source.'" Snider v. Circle K Corp. , 923 F. 2d

1404, 1407 (10th Cir. 1991) (quoting Fulgence v. J. Ray McDermott & Co., 662 F-2d 1207, 1209 (5th Cir. 1981)) - In Snider, plaintiff and her employer entered into a settlement agreement after plaintiff had filed a Title VII charge with the Oklahoma Human Rights Commission and the EEOC. That agreement included the undertaking by the employer "[t]o not discriminate or take any adverse action against Ms. Snider. . . because she filed the above-referenced charge." Id. at 1406. Plaintiff later brought suit against her employer alleging, inter alia, post-settlement violations of Title VII and breach of contract. In the course of determining that a jury trial was not available to the plaintiff in connection with the breach of contract

claim, Judge Logan, writing for the Tenth Circuit, stated that "[t]he linkage between Title VII settlement agreements and Title VII is particularly evident in the instant case. . . . [U]nder . . . [the] settlement agreement, (defendant] promises little more than to refrain from violating Title VII in the future." Id. at 1408. Under the principles set forth in Snider and the authorities referred to therein,[13] plaintiff may not receive damages unavailable under Title VII pursuant to her common law claim. Congress and the Supreme Court have determined that compensatory and punitive damages simply are not available for

[13] Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1095 n.8(4th Cir. 1982) (referred to in Snider, 923 F.2d at 1407 n.1).

discriminatory conduct which occurred prior to November 21, 1991.[14]

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[14] In O'Melveny & Myers v. FDIC, No. 93-489 (U.S. June 13, 1994),Justice Scalia clearly indicated preference for utilizing state common law principles rather than fashioning federal common law principles in determining the tort liability of attorneys who provided services to a bank of which the FDIC was a receiver. Justice Scalia concluded in O'Melveny that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." Slip op. at 10. Although Justice Scalia stated that federal common law should only be created in certain, narrow situations, he noted that "[i]n answering the central question of displacement of California law, we of course would not contradict an explicit statutory provision." Slip op., at 6. In the within case, this court is confronted with a comprehensive federal statutory scheme which explicitly provides for certain damages. To permit plaintiff to use Maryland law to make an end-run around that congressional determination would undermine the several specific comments by Justice Stevens in his opinion in Landgraf, that damages are not available for conduct which occurred prior to November 21, 1991.

Plaintiff, however, argues that 42 U.S.C. § 2000e-7 requires a different result with regard to damages resulting from defendant's pre-November 21, 1991, breach of contract by way of retaliatory conduct. That section provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Thus, state laws which provide additional rights and remedies for employment discrimination are not preempted as such by Title VII. "'The clear inference is that Title VII was designed to supplement, rather than to supplant, existing laws and institutions relating

to employment discrimination.'" Frazier v. Colonial Williamsburg Foundation, 574 F. Supp. 318, 321 (E.D. Va. 1983) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974)). In Frazier, the Court concluded that Title VII did not preempt the plaintiff's state contract claim of violation of an employment agreement by the firing of the plaintiff by his employer without just cause. Judge MacKenzie in Frazier noted that "Virginia's common law rule seeks a result consistent with the objections [sic] of Title VII." Id. at 321. However, in the within case, the breach of contract claim is itself the breach of Title VII -- it does not involve a state's determination that it will independently exercise its " 'regulatory

power over discriminatory employment practices."' Id. (quoting New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980)). Rather, it involves, as did Snider, enforcement by Munday of her right under federal law not to have been subjected to retaliation for exercising her Title VII statutory rights. Therefore, plaintiff herein should not be permitted to obtain damages under state law which are unavailable under the very federal law which itself provides the right which plaintiff is enforcing. As the Court explained in Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711, 723 n.60 (D.C. Cir. 1978),

> The Act envisions coexistence of state and federal remedies when the two are compatible. See Title VII, § 708.. 42

U.S.C. § 2000e-7 (1976). And when state efforts to combat employment discrimination have focused to the extent of express prohibition of invidious practices and designation of a 'State or local authority to grant or seek relief from such practices or to institute criminal proceedings with respect thereto,' Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1976), deferral to that authority is specifically authorized. See Id. On the other hand, a state's generalized concern for prevention of torts and its provision of judicial remedies simply to that end warrants neither preliminary deferral nor displacement of Title VII coverage.

(Emphasis added) (citations omitted). In this case, the damages which plaintiff suffered as a result of defendant's Title VII violation and breach of contract are identical. Therefore, plaintiff is limited to Title VII remedies.

VI. CONCLUSION

For the reasons stated in this opinion, judgment will be entered for plaintiff against defendant in the total

amount of $77,183.47, that is, $17,183.47 for back pay, $20,000 in compensatory damages for psychological harm, and $40,000 in punitive damages.

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Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 7, 1997

No. 94-2192
CA-92-467-K

DAWN F. MUNDAY
Plaintiff - Appellee

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED; WASTE MANAGEMENT OF MARYLAND, INCORPORATED
Defendants - Appellants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

No. 94-2193
CA-92-467-K

DAWN F. MUNDAY
Plaintiff - Appellant

v.

WASTE MANAGEMENT OF NORTH AMERICA, INCORPORATED; WASTE MANAGEMENT OF MARYLAND, INCORPORATED
Defendants - Appellees

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

On Petition fox Reheating with

Suggestion for Reheating In Banc

The appellee's petition fox

reheating and suggestion fox reheating in banc and the EEOC's motion for leave to file an amicus brief in support of the petition were submitted to the Court. As no member of this Court or the panel requested a poll on the suggestion fox rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion fox rehearing in banc and motion for leave to file an amicus brief ate denied.

Senior Judge Heaney dissents.

For the Court,

/s/ Patricia S. Connor
CLERK

42 U.S.C. 2000e2(a)

Unlawful employment practices
(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e3 (a)
Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. 2000e7

Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the

doing of any act which would be an unlawful employment practice under this subchapter.

F. R. App. P. 10(b)(2)

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.